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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 493.

LEO PETER REISTROFFER,
Petitioner,
v.
UNITED STATES OF AMERICA.

MOTION

For Leave to File and Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner Reistroffer.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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(a) MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Petitioner Reistroffer respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on January 12, 1959. Rehearing is sought at this time because this Court on June 15, 1959, decided

Marshall v. United States, No. 383, October Term, 1958, which case, as is pointed out more fully in the annexed petition, contains a similar question to that presented by petitioner to the Court of Appeals in seeking reversal of his conviction in the District Court. The Marshall case decided that where jurors had read newspaper articles referring to the defendant as an ex-convict, the trial Court erred in refusing to declare a mistrial, notwithstanding the jurors' statements that they would not be influenced by such articles and could decide the case only on the evidence presented. Reference to petitioner Reistroffer as an ex-convict was made by a Government witness in the trial in the District Court, although said petitioner did not testify in his own behalf.

Although this petition for rehearing is filed after the expiration of the time prescribed by Rule 58, the grounds upon which it is based arose after such time. The Court clearly has power, in its discretion, to entertain the petition. **Zap v. United States**, 330 U. S. 800; **Stone v. White**, 300 U. S. 643.

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner
Reistroffer.

(b) PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner Reistroffer prays that this Court grant rehearing of its order of January 12, 1959, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case, as prayed for in the petition filed herein on November 5, 1958.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT.

At the time of the filing herein of the petition for a writ of certiorari and at the time of this Court's denial of such petition on January 12, 1959, this Court had not decided **Marshall v. United States**, No. 383, October Term, 1958. The **Marshall** case was decided on June 15, 1959. It is the contention of petitioner that the **Marshall** case contained an issue very similar to one in the instant case, and that that issue was the basis of this Court's reversal of the conviction in the **Marshall** case.

In **Marshall**, the defendant was charged with an illegal dispensing of dextro amphetamine sulfate tablets. He did not take the stand in his own behalf. During the trial certain newspaper articles appeared, in which reference was made to two prior felony convictions of the defendant, one for forgery and one for practicing medicine without a license. Seven of the jurors read the articles, but stated that they would not be influenced thereby, and that they would decide the case only on the evidence and without prejudice. Notwithstanding such statements of the jurors and notwithstanding the trial Court's large discretion in ruling on such an issue, this Court held:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence . . . It may indeed be greater for it is then not tempered by protective procedures . . .
>
> "In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts . . . we think a new trial should be granted."

In the instant case, the following situation occurred during the trial. During the testimony of Government witness Harry Rayner (R. 203) while the Government was presenting its evidence in chief, the witness stated that he talked on the telephone to the defendant Reistroffer, and said to him ". . . you are nothing but a damn ex-convict" (R. 209-210). An immediate request for a mistrial was made by the defense counsel, but this request was denied by the Court, although the jury was instructed to disregard the witness' statement (R. 210). Defendant Reistroffer did not testify in his own behalf.

We believe that the foregoing statement of witness Rayner was equally if not more prejudicial to the petitioners herein as the newspaper articles in the **Marshall** case. Here, just as there, the jurors were exposed to information which the Government could not properly introduce in evidence as part of the Government's case in chief. It would seem that such evidence heard in the Courtroom would be even more prejudicial in the minds of the jurors than articles read by them in newspapers during a court recess. The poison and prejudice thereby resulting could not be eradicated by the trial Court's mere statement to the jury to disregard such testimony. The jury thereby knew once and for all that defendant Reistroffer was an ex-convict, and this knowlege certainly was held by them throughout the trial and could not be erased from their minds. Under such circumstances, the decision of this Court in **Marshall** should certainly control disposition of this case, and certiorari should be granted so that this Court may examine the facts in this case pertinent to this issue in the light of its decision in the **Marshall** case.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of cer-

tiorari be issued to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner Reistroffer.

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....
Morris A. Shenker,

.....
Sidney M. Glazer,
Attorneys for Petitioner Reistroffer.